

File No. MA 012-98

L. Kamerman)
Mining and Lands Commissioner)

Friday, the 2nd day
of October, 1998.

THE MINING ACT

IN THE MATTER OF

Mining Claim L-1221623, situate in the Township of Tyrrell, in the Larder Lake Mining Division, staked by Robert Harold Tyndall and recorded in the name of Strike Minerals Inc., hereinafter referred to as the "Strike Mining Claim L-1221623";

AND IN THE MATTER OF

An application to record Mining Claim 1220307, situate in the Township of Tyrrell, in the Larder Lake Mining Division, staked by James Gosselin, to have been recorded in the name of Royal Oak Mines Inc., marked "filed only", hereinafter referred to as the "Royal Oak Filed Only Mining Claim L-1220307";

AND IN THE MATTER OF

Ontario Regulation 7/96;

B E T W E E N:

ROYAL OAK MINES INC.

Disputant and Appellant

-

and -

STRIKE MINERALS INC.

Respondent

AND IN THE MATTER OF

An appeal by the Disputant pursuant to subsection 112(1) of the **Mining Act** from the decision of the Provincial Mining Recorder, dated the 27th day of February, 1998, for a declaration that the Strike Mining Claim L-1221623 be declared invalid and for the recording of the Royal Oak Filed Only Mining Claim 1220307.

(Amended August 31, 1998)

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ORDER

1. **THIS TRIBUNAL ORDERS** that the appeal and dispute of Royal Oak Mines Inc. be allowed in part and that the recording of the Strike Mining Claim L-1221623 be cancelled.

2. **THIS TRIBUNAL FURTHER ORDERS** that the appeal of Royal Oak Mines Inc. for the recording of the Royal Oak Filed Only Mining Claim L-1220307 be dismissed.

3. **THIS TRIBUNAL FURTHER ORDERS** that the notation "Pending Proceedings", which is recorded on the abstract of the Strike Mining Claim L-1221623, to be effective from the 10th day of March, 1998, be removed from the abstract of the Strike Mining Claim L-1221623.

4. **THIS TRIBUNAL FURTHER ORDERS** that this Order shall be effective on the 15th day of October, 1998, pursuant to subsection 129(2) of the **Mining Act**.

5. **THIS TRIBUNAL FURTHER ORDERS** that no costs shall be payable by either party to this appeal.

6. **THIS TRIBUNAL FURTHER ORDERS** that this Order be filed without fee in the Office of the Provincial Mining Recorder in Sudbury, Ontario, pursuant to subsection 129(4) of the **Mining Act**.

DATED this 2nd day of October, 1998.

Original signed by
L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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AND IN THE MATTER OF

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B E T W E E N:

ROYAL OAK MINES INC.

Disputant and Appellant

- and -

STRIKE MINERALS INC.

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AND IN THE MATTER OF

An appeal by the Disputant pursuant to subsection 112(1) of the **Mining Act** from the decision of the Provincial Mining Recorder, dated the 27th day of February, 1998, for a declaration that the Strike Mining Claim L-1221623 be declared invalid and for the recording of the Royal Oak Filed Only Mining Claim 1220307.

(Amended August 31, 1998)

REASONS

The hearing of this matter was done through written submissions pursuant to subsection 5.1(1) of the **Statutory Powers Procedure Act**, R.S.O. 1990, c. S.22, as amended by S.O. 1993, c. 27, Sched.; and S.O. 1994, c. 27, s.56 and pursuant to paragraph 11(1) of the tribunal's **Procedural Guidelines for Proceedings under the Mining Act**.

Appearances:

Royal Oak Mines Inc.	Paul Coad, Chief Geologist, Eastern Canada Exploration, made written submissions on behalf of Royal Oak Mines
Strike Minerals Inc.	Carl Forbes, President, made written submissions on behalf of Strike Minerals

Background

Initially, this appeal involved three stakings, with disputes having been filed by the two "filed only" applications to record. The stakings took place on September 17, 1996, being the opening day for the lifting of the Temagami Land Caution in Tyrrell Township and others.

The three stakings involved Mining Claim L-1221663 by Alexander H. Clark, completed in five minutes according to the application to record, and being the mining claim recorded at first instance; Mining Claim L-1221623 staked by Robert Tyndall under the direction of Ken Pye and Randy Salo ("the Pye/Salo team"), which was sold to Strike Minerals, completed in 10 minutes according to the application to record; and Mining Claim L-1220307 by James Gosselin on behalf of Royal Oak, finished in 10 minutes, but without the completion time inscribed on the #1 post, as it was missing.

Strike Minerals and Royal Oak filed disputes to the recording of the Clark Mining Claim L-1221663. The Provincial Mining Recorder heard the dispute on February 4, 1998 and issued his decision on the 27th day of February, 1998, ordering that the dispute be allowed in part, ordering that the Clark Mining Claim L-1221663 be cancelled, ordering the recording of the Filed Only Strike Minerals Mining Claim L-1221623, and dismissing the dispute of Royal Oak. Both Alexander Clark and Royal Oak appealed this decision to the tribunal, but Mr. Clark withdrew his appeal subsequent to the filing of documentation.

The parties indicated that they wished this matter to be decided on the basis of written submissions. The tribunal indicated its reservations to this course during a Telephone Pre-Hearing Conference Call held July 7, 1998. In the course of discussions, it was revealed that the Strike Minerals staking had in fact been done by a team headed by Randy Salo, Ken Pye and Patrick Coyne and that there was a videotape made by Bert Young of activities at the #1 post which had not been submitted at the hearing before the Provincial Mining Recorder.

The parties accepted the assistance of the tribunal in attempting to gain release of a copy of the videotape from the Salo/Pye/Coyne team. It was agreed that, if the tape could be acquired, Strike Minerals and Royal Oak would be able to view it, make additional written submissions, which would be submitted to the tribunal along with the tape, and this could assist the tribunal in reaching its findings. As an alternative, it was suggested that Bert Young could give evidence by telephone as to what took place.

The tribunal was able to obtain release of the videotape, which forms the basis for many of the findings of fact below.

Issues

1. What is the effect of a missing #1 post, which prevents recording of completion time? Is the result different if responsibility can be attributed to a member of the staker's own team, staking an adjacent mining claim? Should the tribunal exercise its jurisdiction directing the Provincial Mining Recorder to issue an Order pursuant to clause 110(6)(d) to replace the missing post?
2. What is the effect of failing to erect a corner post upon the requirements of O.Reg. 7/96; upon the tests of substantial compliance and deemed substantial compliance, set out in subsections 43(a) and (b) respectively? Does the failure to erect a post without at least some attempt or display of intent that the post remain upright constitute a staking which may mislead licensees wishing to stake in the vicinity, thereby defeating the test of deemed substantial compliance set out in clause 43(b)(i)?
3. What is the effect of interference and rearrangements of posts by team mates who are neither stakers nor blazers, but simply post guards? Is it relevant that such rearrangement may give the staker for that team a strategic advantage in completing his staking?

Evidence and Submissions

The written evidence and submissions of the two remaining parties, Royal Oak and Strike Minerals, is reproduced, with those portions referring to the Clark staking deleted:

Exhibit 2 - Letter dated March 10, 1998 from Royal Oak to the tribunal

Royal Oak Mines would like to appeal the recent decision made by the Provincial Mining Recorder concerning filed only claim L-1220307 in Tyrrell Twp. No reference number was provided with the decision dated February 27, 1998, concerning claim L-1221663 and filed only claims L-1220307 and L-1221623. Royal Oak would ask that you refer to this written decision as it provides some background to the dispute in question. Royal Oak would also ask that you refer

to the tape recording and notes taken by the Provincial Recorder during the hearing on February 4, 1998, involving the above three claims. Royal Oak would ask that reference also be made to the February 6, 1998 letter to Mr. Roy Spooner, Provincial Mining Recorder, which provides a written summation to Royal Oak's dispute against claim L-1221663 and filed only claim L-1221623 staked by Strike Minerals (attached).

Royal Oak disagrees with the Provincial Mining Recorder's decision concerning claim L-1220307 which was staked by Mr. James Gosselin for Royal Oak Mines on September 17, 1996, for the following reasons:

- o Claim L-1220307 was properly staked by James Gosselin for Royal Oak with substantial compliance of the **Mining Act**. Two helpers were used and they completed the necessary blazing within the elapsed time of ten minutes. Please note that the subject lines were well marked out and a portion of the line from post no. 3 to post no. 4 is actually located along a northsouth trending road. There is no evidence to indicate that Royal Oak did not comply with the rules and regulations concerning the staking of claim L-1220307.
- o The Provincial Mining Recorder accepted other claims staked in Tyrrell Twp. on September 17, 1998, which were recorded with similar completion times [refer to point no. 10 in Schedule A (Documents and information offered as exhibits) concerning file MA 014-98 and a letter dated September 15, 1997 to the Commissioner]. Some of these claims had no helpers and yet they were recorded.
- o The stakers for Strike Minerals (hired by Ken Pye and Pat Coyne to complete staking for Strike Minerals) deliberately harassed James Gosselin during the staking of claim L-1220307. The Provincial Recorder states in his decision that there is nothing in the **Mining Act** which provides for any consequence to physical assault. There might not be any specific consequence which is written in the **Mining Act**, however there is the integrity of the **Mining Act** and of the people who administer the Act that should result in an ethical decision being made in respect to this dispute. In reference to the circumstances concerning the theft of James Gosselin's no. 1 post, the Provincial Mining Recorder in his decision states that ".....I have no idea who moved James Gosselin's post". Considerable evidence was presented during the February 4, 1998 hearing which indicated that James Gosselin's no. 1 post was stolen by the individual staking the claim immediately to the north of claim 1220307. This particular claim (L-1221622) was staked by Mr. Freeman Rogers for Strike Minerals. Please refer to the summation of February 6, 1998 by Royal Oak and the tape recording and notes from the February 4, 1998 hearing. Mr. Forbe's (**sic**) testimony with regard to this matter was given under oath.

- o Royal Oak was hoping that Mr. Forbes would show his video but he did not bring it to the February 4, 1998 hearing. This video will show how James Gosselin actually completed his claim before Mr. Robert Tyndall (working for Mr. Ken Pye and Mr. Patrick Coyne who were working for Strike Minerals). During the February 4, 1998 hearing Royal Oak did not feel that it was necessary to bring up the aspect of the alleged completion time of 9:10 a.m. by Strike Minerals because the aspects of harassment and the stealing of James Gosselin's no. 1 post by another party working for Ken Pye/Patrick Coyne and therefore Strike Minerals would nullify any credibility about claim L-1221623.

- o It is interesting to note that a Mr. Martin Therrien was listed as a helper on Strike Minerals; L-1221623 claim (apparently one of the blazers as interpreted by the Provincial Mining Recorder in his decision of February 4, 1998), however Mr. Martin Therrien is also listed as a helper on Strike Minerals' L-1221624 claim. These claims are "kitty-corner" to each other and both were staked at 9:00 a.m. on September 17, 1996. Obviously, Mr. Therrien could not be a blazer on both of these claims. Also, the Provincial Mining Recorder accepted three other claims staked by Strike Minerals in Tyrrell Twp. on September 17, 1996, which were staked with *no helpers*, yet the completion times are under twenty minutes [L-1220386 (9:16 a.m.) Strike Minerals with no helpers, L-1221602 (9:14 a.m.) Strike Minerals with no helpers and L-1221615 (9:17 a.m.) Strike Minerals and no helpers]. Clearly, Royal Oak's claim L-1220307 which was staked in ten minutes with James Gosselin (professional athlete and experienced staker) and two experienced helpers, would have been properly completed in the time indicated when one compares their completion time with the completion times by Strike Minerals, where no helpers were involved.

- o It was the intent of Royal Oak to properly comply with the **Mining Act** during the staking of claim L-1220307. It was clearly *not* the intent of Mr. Ken Pye and Mr. Patrick Coyne who were working for Strike Minerals, to fairly and honestly compete against Royal Oak on the morning of September 17, 1996. Unfair play and lack of professionalism was deliberately practised during the staking of claim L-1221623 (ie. James Gosselin harassed and pushed to the ground) and his no. 1 post was stolen by an individual staking the claim immediately to the north (L-1221622), a claim which was also being staked for Strike Minerals.

Royal Oak requests that the [tribunal] review this dispute and make a final decision which will help to reaffirm the original intention of the **Mining Act** which was written to provide a framework of rules and regulations which are only credible if the individuals exercising these rules behave in an honest and

professional manner. Royal Oak would like to remind the [tribunal] that Royal Oak has consistently acted in a professional manner vis-a-vis the **Mining Act** and that in all the recent staking rushes [ie. Matachewan (1995), Timmins (1996) and Shining Tree-Gowgama (1996), honesty has been exercised. In situations where it was demonstrated that Royal Oak had erred, then Royal Oak immediately acknowledged this fact and accordingly withdrew disputes etc. ...

Attached to Exhibit 2 is a letter from Royal Oak to Roy Spooner, Provincial Mining Recorder dated February 6, 1998, with those portions relevant to the dispute of Strike Minerals Mining Claim L-1221623 reproduced:

Royal Oak's summation to its dispute vs. the claim staked by Strike Minerals.

Royal Oak would ask the Provincial Mining Recorder to refer to the two letters (exhibits) written by James Gosselin on January 27 and 28, 1998 and the testimony by Mr. Rolland Collins (under oath) which describes the events which happened on September 17, 1996. James Gosselin who recently came in 6th in an all Canadian Junior mens foot race, was hassled by a competitor staker who wore a white T-shirt with a blue stripe, between the no. 1 and the no. 3 post area. This individual would not allow him to pass on the line and in one instance even pushed James to the ground. Another individual with a white T-shirt and blue stripe focused on just staking the claim. These individuals with the white T-shirts and blue stripes were working for Ken Pye and Pat Coyne who were in turn working for Strike Minerals. James Gosselin had two helpers to blaze the lines. The one helper commenced from the no. 3 post at 9:00 a.m. and the other helper started from the no. 1 post at 9:00 a.m. on September 17, 1996. When James Gosselin returned from the no. 4 to the no. 1 post area to inscribe his completion time, he discovered that this post had been stolen. Mr. Forbes of Strike Minerals (under oath) stated that the post was stolen by Norm Collins of Royal Oak, who he had been advised was staking the claim immediately to the north. This entire action was captured on video by Mr. Burt Young who was hired by Strike Minerals. Mr. Forbes did not show the video at the hearing, but confirmed under oath that in a recent telephone conversation with Paul Coad, he had stated that Norm Collins had taken the no. 1 post of James Gosselin. A conversation by Ken Pye with Paul Coad on or around September 20, 1996, collaborates this incorrect testimony, that Norm Collins had stolen the no. 1 post from James Gosselin. The exhibits presented by Royal Oak at the hearing clearly indicate that Royal Oak was not staking the claim immediately to the north of the claim in question and that Norm Collins was staking a claim one-quarter of a mile away to the northeast. The claim abstract for L-1221622 which is the claim to the north of James Gosselin's claim L-1220307, was staked by Freeman Rogers for Strike Minerals and not staked by Norm Collins working for Royal Oak. The recording for L-1220303 staked by Norm Collins on September 17, 1996 at 9:00

a.m. was located one claim further north from L-1220307 and the letter dated January 20, 1998 by Peter Harvey confirms that he witnessed the staking of claim L-1220303 by Norm Collins. Please refer to exhibit no. 1 (colour coded claim map), which illustrates the different claims staked on September 17, 1996 in the area in question. James Gosselin should be awarded his claim because he was unfairly hassled by the competition and he had his no. 1 post stolen by some individual. The testimony and exhibits presented at the hearing illustrate these facts. James Gosselin is a well conditioned athlete and with the help of two blazers he was able to properly stake claim L-1220307 in a time of ten minutes. Royal Oak requests that filed-only claim L-1220307 be awarded to James Gosselin.

..... Mr. Forbes of Strike Minerals, did present the truth as it was presented to him, unfortunately for Strike Minerals, Mr. Forbes was incorrectly advised by Mr. Ken Pye and Mr. Pat Coyne, that the claim post had been stolen by Norm Collins, a staker for Royal Oak. Also, Mr. Forbes was not aware that Mr. Ken Pye and Mr. Pat Coyne had purposely hired an extra individual to deliberately hassle the competition.

The decision of the Provincial Mining Recorder, Roy Spooner, dated February 27, 1998, resulted in the cancellation of the Clark Mining Claim L-1221663, the recording of the Strike Minerals Mining Claim L-1221623, and the refusal of the Royal Oak Mining Claim L-1220307. Portions of the decision, included in Exhibit 4, are reproduced:

As Royal Oak and Strike Minerals have demanded examination of the elapsed time for the staking of the Clark claim I must do the same for the James Gosselin and Robert Tyndall staking.

James Gosselin indicates he completed his staking in 10 minutes. On Part B of the application to record there are no names listed for anyone who may have assisted in the staking. I do not believe it possible that Gosselin could have blazed all four lines and done everything necessary to stake the claim in compliance without some assistance. In a letter to me dated January 27, 1998 Gosselin indicates he had two helpers (Exhibit No. 4 [in the hearing before the Recorder]). The helpers should be listed on the application to record whether or not they hold a prospector's licence.

Mr. Clark raises an interesting question in his written summary. He indicates that it is "contrary to the Act" to have the staking commence from two different locations. Apparently the two helpers on the Gosselin claim began from two different locations at 9 AM. One helper began with Gosselin from the # one corner and the second helper began, at the same time from the #three corner. The relevant subsection of the Staking Regulation is 10(2) where it states: "*1. The staking must start in the northeast corner of the mining claim and proceed in a clockwise direction.*"

Blazing claim boundaries is an integral part of the staking procedure. If the staking begins in two different places there may be an argument that the Staking Regulation does not authorize it. At this time I prefer to consider it as something the Staking Regulation does not prohibit. Royal Oak was required to begin in the northeast corner and proceed in a clockwise direction. They did that. They also started in the southwest corner and the regulation does not address whether it can be done or not.

I find it within the realm of possibility for Gosselin to race around the mining claim in ten minutes erecting posts and inscribing them. I also believe it is possible for the two helpers to race around the claim each blazing, in a fashion, 800 metres of claim line in 10 minutes. I do not believe that the lines could be sufficiently blazed by the helpers so that the boundaries are "clearly marked during staking by plainly blazing the trees on two sides"(Subsection 8(4) Staking Reg). Whether or not the lines were pre-cut and pre-blazed there remains the same requirement to clearly blaze the lines as if there were no preparation of the lines beforehand. The lines must be blazed after 9 AM. It is a time consuming task and I am not convinced that two people can properly blaze 1600 metres of boundary line in ten minutes.

Robert Tyndall indicates he also completed his staking within ten minutes. On the application to record he names four helpers. A ten minute mining claim staked by five people is extremely fast however I can manage to accept it as possible. I can only decide on the balance of probabilities as I cannot be certain of any of the events. Considering the elapsed time for staking I find it more likely that the Robert Tyndall complied with the minimum staking requirements in regard to blazing claim boundaries.

The Royal Oak claim and the Strike Minerals claim apparently had the same completion time. I cannot record both claims. Royal Oak has priority in recording however I find it unlikely their claim was staked in substantial compliance considering the short time period the helpers had to blaze the boundary. I hesitate to point to Gosselin's failure to inscribe the completion time on the final post as he was sabotaged. It is a defect however, and there may be an argument that Strike Minerals did inscribe the completion time therefore should be recorded. When I consider all the factors, I arrive at a conclusion that Strike Minerals should be recorded for Tyndall's 1221623. The "filed only" claim 1220307 staked by James Gosselin for Royal Oak is therefore refused.

Strike Minerals' written documentation is comprised of written submissions with nine documents attached (Exhibit 8). Part 2 of the written submissions concerns the Royal Oak appeal and is reproduced, with relevant portions of the attached documentation:

In the summation by Royal Oak, they suggest the video tape taken by

Strike Minerals on September 17, 1998 be submitted as evidence. Strike paid for this so called video and would only submit it as evidence if we wanted to. Royal Oak has no right to this video even though they've tried to obtain it of late as it discloses that the reference by everyone to the stolen #1 post of Mr. Gosselin was inadvertently taken by another Royal Oak employee.

Paul Coad states that individuals staking for Strike Minerals deliberately harassed James Gosselin and that Mr. Gosselin's claim was properly staked. I shall point out again that Strike had no employees as such and any reference to purported employees is completely wrong. Mr. Spooner's decision clearly reflects that James Gosselin's claim was not properly staked and his decision on the matter of Mr. Gosselin's Claim 1220307 should stand. I submit Mr. Gosselin's application to record as Document #5. Royal Oak relies on a lot of innuendo and hearsay to substantiate Mr. Gosselin's Claim 1220307, but several points completely arise to treat Mr. Gosselin's claim as non-existent. He did not put a finishing time on his No. 1 post and therefore he did not finish his claim. Hearing that Mr. Gosselin had two helpers, yet there is no mention of these helpers on his application to record. Due to both these infractions, Mr. Gosselin's claim has to be ruled non-existent. Mr. Spooner's decision in the matter of Mr. Gosselin's claim must be respected as Mr. Spooner made an unbiased decision of the facts and on the evidence he had to go on. Nor further information has been put forth to refute or question Mr. Spooner's decision. It is my firm belief Mr. Spooner acted in a very professional manner, accepted evidence and testimony, and ruled on what he deemed as a proper decision. His decision reflects on many matters, was well determined and must stand as a reflection of his professional ability to adjudicate such matters.

SUMMARY

(1) Mr. Spooner's February 27, 1998 decision is a bona fide determination and should stand.

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(4) Mr. Gosselin did not complete his claim.

(5) All reference to harassment or stealing posts is hearsay with no proof. In any case Strike's posts were all there and Mr. Spooner's decision reflects the sequence of continuous staking procedure on the claim Strike purchased.

(6) Whether or not harassment or other shenanigans transacted has no bearing on Strike's claim now recorded as L-1221623. Strike had no employees on this site on the morning of September 17, 1996 other than Mr. Bert Young, a retired Ontario Provincial Policeman acted as a video cameraman and witness. Should this matter go to a hearing I would wish to call him as a witness.

(7) Strikes' only presence in this matter is as a bona fide purchaser for value represented by the agreement attached hereto as Document #2. With respect to being subject to honouring the intention of the **Mining Act**; Strike has lived up to this moreso (**sic**) than any other parties hereto.

(8) Mr. Spooner's decision of February 27, 1998 reflects all matters aforementioned and must stand if anyone in this Province can respect anything. Mr. Spooner's adjudication of this matter is an entirely legal and honourable administration. It is attached hereto as Document #6.

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(11) I believe costs should be awarded to the Respondent due to the entire frivolous nature of which Strike Minerals Inc. has been subjected to.

I submit Document #9 as cost due to Strike Minerals Inc.; annotated with proper respect.

Document #2 is an agreement dated October 23, 1996 between Strike Minerals and Christina Coyne for the sale of eight unpatented mining claims of which L-1221623 is one.

Royal Oak made additional written submissions to the tribunal by letter dated May 12, 1998 (Exhibit 7) which is reproduced:

Royal Oak Mines would like the Commissioner to refer to a letter forwarded to your office on March 10, 1998 concerning claim L-1221623 (Strike Minerals) and filed only claims L-1221663 (A. Clark) and L-1220307 (Royal Oak Mines). This letter provides a list of all the various resources/references that can be used by your office to make an informed decision concerning this appeal and file MA 012-98. Royal Oak would like to also suggest that the video tape which was taken by Strike Minerals on September 17, 1996 be submitted as evidence. As mentioned in the March 10, 1998 letter and a letter of February 6, 1998 (letter to Roy Spooner, summation to hearing dated February 4, 1998 and attached), it was hoped that Strike Minerals would show this tape at the hearing. As mentioned in the letter of March 10, 1998, it would be prudent to obtain a copy of Roy Spooner's notes and exhibits from the February 4, 1998 hearing and also the tape recording which was used throughout the hearing. The notes and recording will corroborate any information listed by the various parties involved with this particular file.

Royal Oak believes that the individuals staking for Strike Minerals (claim L-1221623 and claim L-1221622 immediately to the north) deliberately harassed Royal Oak's staker James Gosselin and that filed only claim L-1220307 (James Gosselin for Royal Oak) was properly staked and complied with the requirements of the Ontario **Mining Act**. The previously mentioned correspondence, hearing notes + tape recording and video (if Strike Minerals will provide it) clearly show that the filed only claim L-1220307 should be recorded by the Mining Recorder. Royal Oak asks that the Commissioner take the time to review these resources (please refer to summation in letter of February 6, 1998 which is attached). This evidence clearly shows how the stakers for Strike Minerals hassled James Gosselin during the staking, that another crew staking claim L-1221622 for Strike Minerals hassled James Gosselin during the staking, that another crew staking claim L-1221622 for Strike Minerals to the north, stole James Gosselin's no. 1 post and that under further research it was ascertained that Strike Minerals (or contractors for Strike Minerals) listed the same individual as a helper on two different claims staked at the same time of 9:00 a.m. on September 17, 1996 (Martin Therrien - refer to March 10, 1998 letter to the Commissioner's office).

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Royal Oak requests that the Mining and Lands Commissioner review file MA 012-98 and make a final decision which will help to reaffirm the original intention of the **Mining Act** which was written to provide a framework of rules and regulations which are only credible if the individuals exercising these rules behave in an honest and professional manner. It is important that the correct message be sent to the mining community.

The videotape made by Bert Young was provided following the Pre-Hearing telephone conference call held on July 7, 1998, and Royal Oak and Strike Minerals provided additional submissions and comments concerning the video. These are reproduced:

Letter from Royal Oak dated July 27, 1998

A copy of the videotape pertaining to the above file was acquired from Mr. Ken Pye on July 23, 1998. A copy of the tape has been forwarded to Mr. Carl Forbes and your office for review. General aspects about the tape are summarized below:

Firstly, the language on the tape may be offensive to some individuals. The first part of the tape records activities on the morning of September 17, 1996, in and around Ken Pye's campsite. There is also videotaping of the initial helicopters in the area. The tape recording is made by a Mr. Burt Young who identifies himself on the tape. Please take note of the individuals in white T-shirts,

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purposely dulling their axes/hatchets prior to staking (ie. no intention of using the tool for blazing purposes). The portion of the tape which relates to the claim staking involving the above file MA 012-98 starts where the men are gathered about some claim posts in the bush. Randy Salo is dressed in a pinkish jacket with a tan coloured hat and is part of the Ken Pye, Pat Coyne and Don MacKinnon Jr. group and their runners and helpers are wearing white T-shirts. Individuals wearing an orange vest represent those runners and helpers working for Mr. Rolland Collins (Royal Oak). Most views in the videotape are facing south. Ken Pye's group have 2 stakers/runners competing for the claim. The one individual has shiny dark blue trunks on and dark hair. The second individual has a white T-shirt on and grey coloured sweatpants. James Gosselin (Rolland Collins/Royal Oak) has a dark blue sweatshirt over top of his orange vest, the former of which he takes off prior to the staking. The time shown on the tape does not reflect the real time of the staking event but can be used as a reference throughout the tape. The staking commenced at 9:00 a.m. on September 17, 1996, and the time on the tape indicated 7:50 a.m. One helper with an orange vest (Royal Oak) and one helper with a white T-shirt (Ken Pye et al.) commence blazing at 9:00 a.m. and work southward from the no. 1 toward the no. 2 post area. Other claim stakers come into view from staking taking place to the east of the subject claim and to the north of the subject claim. The tape illustrates how a Ken Pye runner (Freeman Rogers with a white T-shirt) comes in from the north first, followed by an individual with a (sic) orange vest (Rick Degenais for R. Collins/Royal Oak). Royal Oak did not know that Rick Degenais was staking in this area, prior to viewing the tape. Further blazers come into view during the recording. At 7:57 there is a gap or jump in the time from 7:57 to 8:03 a.m. At 8:03 a.m., James Gosselin (R. Collins/Royal Oak) comes into view and is seen looking for his post. At this time, James Gosselin states ".... you f.... you know you're beat and later states that even your own team admit to the post being there". Videotape continues to show James Gosselin looking for his post and Ken Pye's two runners standing near their no. 1 posts marked with blue ribbon. James Gosselin is observed putting on a jacket and it is assumed that it is at this time that he travels to the helicopter to report the stolen post to R. Collins. R. Collins subsequently via the helicopter pilot (John Levesque) radios to Mr. Ron Gashinski in the MNR helicopter that James Gosselin's post was stolen (all these points were recorded at the February 4, 1998 hearing in Sudbury). There is another gap in the tape at 8:06 a.m. At this time the tape time jumps from 8:06 to 8:10 a.m. shortly after this the tape goes blank.

Royal Oak will comment upon specific actions which took place during the staking of the subject claim on September 17, 1996 and which were recorded on the videotape

1. James Gosselin attempted to erect his no. 1 post by placing it against a tree. He did not see the post fall after he had placed it against the tree.

The definition of erected: "to put up by the fitting together of materials or parts to fix in an upright position" (Websters, 1983). The competition *deliberately* made no attempt to erect or fix their posts in an upright position. The competition's no 1 posts were simply placed into the air allowed to fall to the ground. In fact, the competitor with the dark shorts, actually lifted his post to about a 45 degree position as recorded on the videotape.

2. At 7:51 a.m. on the tape, the verbal comment is made in french by the competition that "... you are not allowed to move the post" (translation provided by R. Collins).
3. At 7:52 to 7:53 a.m. the competition's no. 1 posts are both erected by the competition's helper/foreman (white T-shirt).
4. At 7:54 a.m. the tape illustrates Rick Degenais (R. Collins/Royal Oak) coming down from the north and inscribing his no. 2 post. The view is facing south as R. Degenais inscribes his post and then lifts it onto the pile of posts. It is not clear to Royal Oak what post he used to inscribe his no. 2 post, however Ken Pye and Pat Coyne believe that he used James Gosselin's no. 1 post. Note: there is no verbal comment by the competition to tell R. Degenais that he is using the wrong post and there is no verbal comment by the competition and Bert Young to James Gosselin, that another Royal Oak individual used his post.
5. The videotape does not illustrate the staker, James Gosselin for R. Collins (Royal Oak) coming into the no. 1 post area from the no. 4 post area. The videotape was deliberately stopped at this time and this would account for the gap in time on the tape from 7:57 a.m. to 8:03 a.m. Alternatively, the tape was spliced at this point to delete pertinent information.
6. At 8:03 a.m., the videotape illustrates James Gosselin looking for his tape and stating "... you f... you know you're beat."
7. At 8:04 a.m., the tape illustrates the competition with the white T-shirt, dark shorts and dark hair coming into view and inscribing his no. 1 post.
8. At 8:04 a.m. James Gosselin points to the tree where he left his no. 1 post after inscribing it at 7:50 on tape (9:00 real time). The competition runner acknowledges this point.
9. At 8:05 a.m. James Gosselin states that "... I checked all the four posts with orange flagging and mine is not there".

10. At 8:05 a.m., the tape illustrates the two white T-shirted individuals talking near their no. 1 posts. There is a discussion to the fact that they both went the wrong way at the no. 2 post area. There is the comment "... oh s[...]" and then the individual with the grey track pants walks away. The white T-shirt with the dark shorts, walks up to his no. 1 post and inscribes some additional information on his post. This is only partially captured on the videotape. This inscription occurs just before 8:06 a.m. on the tape.
11. There is no verbal evidence or videotape recording of James Gosselin tampering with the video camera.

Facts:

- o Competition to James Gosselin (Royal Oak) did not attempt to properly erect their no. 1 posts. This contravenes Ontario **Mining Act** Regulation, section no. 8(2).
- o Competition stakers/runners had to be told to erect their posts by their competition foreman. As per the Ontario **Mining Act** Regulations, section no. 9(2), it is the recording licensee who must direct other licensees as well as non-licensees in constructing claim posts and marking the perimeter of a mining claim.
- o The competition had *only* one helper to blaze for the two different stakers/runners from the no. 1 to the no. 2 post area. This contravenes Ontario **Mining Act** Regulation, section no. 8(4).
- o Competition did not complete staking before James Gosselin. White T-shirt and dark shorts staker seen inscribing post at 8:04 a.m., well after the time that James Gosselin had arrived and then this same individual performed a *late* inscription on his no. 1 post at just before 8:06 a.m. (tape time). Legally his completion time would therefore have to be considered 8:06 a.m. on the videotape, well after the time that James Gosselin had arrived back to the no. 1 post area.
- o Competition foreman/helper erected both of their no. 1 posts after they had been inscribed by their stakers (recording licensees), after acknowledging in french that it was an improper (**sic**) procedure to do so. This contravenes the Ontario **Mining Act** Regulation, section no. 10(2) 2.
- o James Gosselin's no. 1 post was stolen. The implication by Ken Pye and Pat Coyne is that it was used by R. Degenais (R. Collins/Royal Oak). There is no clear evidence who took the post other than the fact that it was not present when James Gosselin returned to the no. 1 post area to finish his claim.

- o Norm Collins on or around September 18, 1998 returned to the area of the subject claim and reported to R. Collins that none of Royal Oak's posts were present at the no. 1 post area. Mr. Bob Bailey in his claims inspection report, similarly could not locate any of the Royal Oak claim posts. On June 16, 1998 Peter Harvey and the writer examined the subject area and there were no Royal Oak posts in the area, including either James Gosselin's no. 1 post or R. Degenais's no. 2 post which was inscribed at 9:03 a.m., as recorded in the videotape on September 17, 1996.
- o The videotape (taken by Mr. Burt Young for Strike Minerals and the Ken Pye group) purposely did not record events taking place between 7:57 a.m. and 8:03 a.m. and 8:06 a.m. and 8:10 a.m. or was purposely cut and spliced in these areas after the tape was recorded. Key information was obviously not recorded or subsequently deleted from the videotape.

Royal Oak contends that James Gosselin should be awarded his claim L-1220307, because he attempted to properly erect his no. 1 post, he completed the staking prior to the competition (sometime between 7:57 and 8:03 a.m. on the tape at 9:10 in real time) and the necessary blazing was completed by his two helpers wearing orange vests (recorded on the videotape). It was not his fault that his no. 1 post was stolen by someone prior to his arriving back at the no. 1 post from the no. 4 post area.

The competition deliberately failed to properly erect their no. 1 posts and the competition's helper after verbally acknowledging the fact in french that it was improper to move the posts, then moved both of their no. 1 posts. Only *one* competition helper blazed between the no. 1 and the no. 2 post area, yet there were two competition stakers/runners. Both of the competition's runners admit to an error during the running at the no. 2 post area as recorded verbally on the videotape. The competition runners did not beat James Gosselin into the no. 1 post area from the no. 4 post area (recorded and implied visually on the videotape). The white T-shirt runner with the dark shorts and dark hair inscribed his no. 1 post *late* after he had already inscribed it. All of these actions by the competition contravene key sections in the Ontario **Mining Act** and therefore the claim should be rightfully awarded to James Gosselin and Royal Oak. It was James Gosselin's intent to properly stake the subject claim and comply with the Ontario **Mining Act**. James Gosselin was not only reportedly hassled by the competition during the staking of his claim but he could not properly record his finish time because his post was stolen.

The Provincial Mining Recorder did not have the opportunity to view this videotape, as it was not made available at the hearing on February 4, 1998. Royal Oak believes that this video provides direct evidence through visual

perspectives, verbal comments and implications that it was James Gosselin's intention to properly stake his claim L-1220307 and comply with the Ontario **Mining Act** and that at the same time it was the competition's intention to win the claim using any means possible, irregardless of the fact that their actions contravened different sections of the Ontario **Mining Act**. Royal Oak would not hire individuals who did not comply with the Ontario **Mining Act**.

The submission of Strike Minerals dated August 21, 1998 is reproduced:

Mr. Coad alludes that one of our men is purposely dulling his hatchet against a stone. If you look closely this chap is using the granite stone as a whet stone to sharpen his hatchet. Later in the video this same chap who was supposedly dulling his hatchet sticks this same hatchet easily into a claim post.

The tape clearly shows Mr. Gosselin's #1 post was not erected and fell on the ground at 9:A.M. starting time. The tape also clearly shows that our posts were erect, but this is all just a moot point as a loose post will eventually fall on the ground unless spiked to something solid.

It is hard to ascertain what happened to Mr. Gosselin's number one post. It seems that one of his team members used his number one post as his number two post.

Naturally there is no evidence of James Gosselin tampering with the video camera. That's because he knocked it out of Bert Young's hands, ending the video taping.

FACTS

(1) Both the Royal Oak and Ken Pye stakers made a quick effort to erect their posts; both ending up lying on the ground.

(2) Mr. Coad is wrong about his mention of 8(4). there is nothing to say that one blazer/helper can't be working for two different stakers at the same time as all three parties are working together. It is insurance in case one staker falls or hurts himself so that the other staker could still complete the claim.

(3) Mr. Coad is wrong stating that the foreman/helper erected Mr. Tyndall's post. If he had looked carefully it was Mr. Tyndall who re-erected his number one post.

(4) The question of Mr. Gosselin's missing number one post is guesswork. It would seem to me that if Royal Oak was so intent on acquiring this claim and had several helicopters engaged; it would have been a small portion of their overall expenditure to have a post guard at Mr. Gosselin's number one post. We

had Bert Young guarding Mr. Tyndall's number one post and acting as a cameraman at the same time. As to where any posts went after or during the staking I do not know, but I do know the video clearly shows Mr. Tyndall did complete his claim and is recorded on video.

(5) Mr. Paul Coad states that it wasn't Mr. Gosselin's fault his number one post was stolen or misplaced. However, the onus of assuring that his post be present upon claim completion falls upon the shoulders of Royal Oak. I again reflect that for all the money they put into this endeavour that it would have been a very cheap necessity to have one chap to guard Gosselin's number one post.

(6) There is no evidence that Mr. Gosselin was harassed. If anything the video tape shows Mr. Gosselin to be a rude belligerent person as all our chaps were well behaved. Mr. Gosselin verbal remarks were very disparaging and he harassed Bert Young by knocking the video camera out of his hand. Mr. Gosselin's statements on the video are unnecessarily abusive toward Bert Young who was a true gentleman throughout the whole filming process. At the end of the tape our chaps are even trying to help Mr. Gosselin find his post.

(7) The accusations of Bert Young taking Mr. Gosselin's post is bizarre. Bert Young was constantly videotaping everything and besides; being a retired O.P.P. officer he can be classified as an impartial witness. I feel Bert Young conducted himself with nothing but respect for all parties involved.

(8) It was Mr. Gosselin's intent to finish his claim. However, he did not finish due to the frustration and fury of the moment. The bottom line is that Mr. Gosselin **did not finish his claim** and therefore he has no claim to record. By not having a physically completed claim there can be no way to award the claim to Mr. Gosselin. His right and title doesn't exist by virtue of non-completion. Therefore Mr. Tyndall's claim L-1221623 should stand on record as it currently is.

(9) Strike would like costs in this matter as previously defined in the amount of \$5,000.00.

The Videotape

The tribunal has had occasion to view the videotape numerous times. In fact, given the activities which were captured on film and some which were apparently not, much time was spent viewing certain portions, using the "pause" function and comparing frames corresponding to certain key times. The following is information upon which findings are based.

In the minutes preceding the commencement of staking, there are a number of individuals seen within range of what is to become the #1 post location for the stakings, although

a direct view is obscured by trees. To the far left are four individuals obscured by trees, two appearing to wear white T-shirts, one with an orange cap and the fourth identified as Randy Salo, who is wearing an orange jacket and grey baseball cap. Towards the middle and nearer the #1 locations is a man in an orange vest and grey baseball cap, a man in a white T-shirt and orange baseball cap, and James Gosselin, who discards a blue pullover and is then seen in an orange vest over a blue long-sleeved turtleneck. To the right is a man in a white T-shirt over a green long-sleeved jacket or sweater and wearing a black baseball cap, one man with dark shorts and white T-shirt and another man in grey sweatpants who removes a dark sweatshirt to reveal a white T-shirt. These individuals are in addition to Bert Young, who is described as doing the videotaping.

These last two individuals are the stakers on behalf of what is described as the Pye/Salo team. James Gosselin has been established as the staker for Royal Oak and his helper is the individual in the orange vest and grey baseball cap with a blue backpack carrying an axe. For the duration of the staking, other than those four who are actually staking, of the individuals described above, the camera captures only the individual with the white T-shirt over green wearing the black cap. Whether the other individuals remained in the area is unknown.

In the few moments prior to staking, there are two Royal Oak contractors/employees visible being James Gosselin and his helper. There are five Pye/Salo members visible, all with white T-shirts. The two runners have no hats, two of the helpers have black baseball caps and one has an orange baseball cap, and a white T-shirt over a plaid long-sleeved shirt. It is this single helper with the orange cap who actually blazes once staking has commenced.

Although difficult to discern, there appear to be no fewer than 13 cut trees for potential claim posts on the ground. In fact, one appears to be a commercial grade 6 x 6. Nine are lying parallel across the frame, from the lower right to upper left corner, with three having orange flagging and at least five having blue flagging tape. One additional orange flagged post is lying perpendicular to these posts, with the faced side in the lower left frame. There are two additional blue flagged posts near the top of the frame, just beyond the nine described above, which are used by the two Pye/Salo stakers at the commencement of staking. In addition, in the right middle portion of the frame is an upright cut post with green flagging tape, which has another commercial grade 6 x 6 leaning against it on the right side.

At the commencement of staking, James Gosselin is in the foreground crouching over the one orange flagged post which is perpendicular to the rest. The two Pye/Salo stakers are in the top of the frame, virtually side by side, although their posts do not have the same orientation. The individual in the white T-shirt over green counts down the time, and is located next to the green flagged upright post. There is another individual with a white T-shirt and black baseball cap further to the right. The two helpers are in the mid-left of the frame and are seen blazing after staking commences.

Of the two Pye/Salo stakers, the first to complete his inscription is on the right. He stands, turns 360 degrees and crouches to erect his post. At the moment he crouches to pick

up his post, the other Pye/Salo team member has completed his inscription and turns and commences running. The first staker "erects" his post and then turns to his fellow staker. It is unclear whether it is this first staker who speaks or someone else, but the words "erect your post" are heard. This first staker has his post in the erect position, does not balance it against any standing tree and has the appearance of pushing it to the ground. He then commences running. The second staker, by this point has returned to his post, has "erected" it almost perpendicular to the ground, when he releases it and recommences running south. This post, also having nothing to lean against, falls to the ground.

James Gosselin is observed finishing his inscription after the two Pye/Salo stakers, coincidental with the return to his post of the first staker. Gosselin, after completing his inscription on one of the posts with an orange flag, he drags his post a short distance to erect it by standing it against a tree which is located in the left corner of the frame. As he commences running south, Gosselin's post is seen falling, first into the arms of the individual who counted down the start time, who releases it. The post falls away from the tree against which it is erected so that it is perpendicular to those posts remaining on the ground, at a location which is approximately 1/3 the way up their length. The faced end of the post points towards the middle right portion of the frame. [This position on the ground corresponds almost exactly with where this post was at the commencement of staking] Through repeatedly viewing this portion of the tape, the tribunal notes that the corner post falls with the inscription side facing down.

At 7:52 on the tape, which the tribunal has been advised is 9:02 "real" time, a blazer is observed on tape, wearing an orange vest and wielding a machete.

At 7:53 on the tape, or 9:03 real time, a comment is heard in English, "you can stand them up if you want." The Pye/Salo team member who counted down the staking responds to the comment and stands one of the two blue flagged posts against a tree in the upper right of the frame. That same person moves to stand up the other blue flagged posts against a tree in the upper left, to be directed to move it up against the same tree as the first.

At 7:53/54 on the tape, or 9:03/04 real time, a staker bearing the Pye team signature white T-shirt with the blue stripe, who may be Freeman Rogers, based upon the tribunal's viewing of an earlier tape in another matter comes to this location and selects one of the remaining blue flagged posts lying parallel to the others on the ground. While this individual is inscribing, another individual, wearing an orange vest, runs to this location and selects the perpendicular orange flagged post [The tribunal has confirmed through repeated viewing that this is Gosselin's #1 post] and commences his inscription.

Rogers finishes his inscription first, whereupon he erects the post against the upright post with the green flagging tape, located in the mid to lower right of the frame. He then proceeds west, according to the words of Bert Young, which can be heard on tape.

The orange flagged [Gosselin] post used by the second staker observed, is also erected against the green flagged upright post, when the inscription is completed.

The tribunal has viewed this portion of the tape repeatedly, and compared it with the frames corresponding to the commencement of staking, and is satisfied that this Royal Oak staker, who is wearing the signature orange vest, has used Gosselin's #1 post. Again, through repeated viewing, Gosselin's inscription is on the side of this post which is placed against the post flagged in green. When this orange flagged post is erected, both it and the blue flagged post move, so that they straddle the green flagged post, with the orange on the right and the blue on the left.

At 7:54 on the tape, or 9:04 real time, another staker wearing a white T-shirt comes to this location and selects another blue flagged post lying parallel on the ground and inscribes it. He makes no initial attempt to erect it, but simply resumes running. However, he is told to "stand it up" at which point he returns, stands the post almost perpendicular to the ground, to be told "that's good" at which point he releases it, and allows it to fall to the ground virtually to the same spot where he picked it up.

The orientation of the three posts used at this location is noted, namely the two, orange and blue flagged posts straddling the green, and the second blue flagged post laying on the ground, almost parallel to those remaining posts untouched on the ground.

At 7:56/57 on the tape, or 9:06/07 real time, Bert Young does a close-up of one of the two original blue flagged posts, and then loses his focus, with the camera, out of focus, filming the ground and trees. Nothing is captured on tape during this interlude. Then the tape skips on to the next sequence, with six or seven minutes unaccounted for.

At 8:03/4 on the tape, or 9:13/14 real time, James Gosselin is at the location, looking for his post. Now, standing at the green flagged post are the one orange flagged post of Royal Oak, straddling to the right, but with a different orientation, and two blue flagged posts straddling to the left. The unflagged commercial grade 6 x 6 post, although still lying on the ground, has also changed orientation.

Almost immediately after this segment commences, the Pye/Salo staker with the shorts is seen entering the area and moves to inscribe his completion time on his post, which he locates leaning against a tree. The exact words used are not discernable, but it would appear he is given some direction as to where he might locate his post.

Findings

The written evidence and submissions made in this matter warrant comment. It cannot be sufficiently stressed that the tribunal requires facts, as opposed to opinions, accusations and rhetoric upon which to reach its findings. It is not sufficient to say that one staked in accordance with the requirements of the **Mining Act**. Rather, one can describe the

actual steps which were taken. It will be the decision-maker, either the Provincial Mining Recorder or the Commissioner, who will ultimately determine whether the **Act** has been complied with to a degree to constitute substantial compliance or deemed substantial compliance, within the tests outlined in section 43.

As far as the making of a videotape is concerned, it must be kept in mind that the taping is not in the league of professional film-making. It is not possible to have numerous "takes" of the same scene from different perspectives, capturing all of the necessary or desirable information. Therefore, the person wielding the camera should in future be given guidance as to what would be useful or desirable information in case of any subsequent disputes.

At the commencement of staking, it would be useful to capture all of the stakers and blazers in one frame, commencing their activities. Once the posts have been inscribed and erected by the stakers, it would be useful to provide a close up on the various posts so that the inscriptions can be read. At the completion of staking, a vantage point capturing the northern boundary between the #4 and #1 posts is useful, but should be selected so that the filming can readily move to capture the #1 corner posts and the stakers completing their inscriptions. It would be useful to capture on film the blazers coming in, whether prior to or after the stakers. Given bush conditions, it would be preferable to capture those moments when inscriptions occur in preference to stakers running along the north boundary, although this information may at times also be useful. At the completion of staking, a close up of each of the posts would again prove useful. Finally, in order to remove any concerns regarding film editing or tampering, the camera should be allowed to film throughout the period of the staking, even though nothing is occurring at the site. In other words, turning the camera on and off only raises questions of whether something was done while the camera was off, or whether informative portions of activity have been edited out prior to submitting the videotape. It is recognized that this activity takes place in the bush, so that conservation of batteries is also a concern. Purchase of additional batteries would be the desirable solution.

Staking Requirements under the **Mining Act**

The rules surrounding the staking of a mining claim have substantially changed with changes to the **Mining Act** made effective June 3, 1991, although the trend was already laid down by the decision of the Divisional Court (Southey J.) in **Ramsay v. Fernberg**, (1989) 7 M.C.C. 385. Essentially, there has first been a judicial move, followed by a legislative move away from the strict compliance with a set of fairly rigorous rules and procedures involved in staking captured by the cumulative defects doctrine, to the increasingly flexible and forgiving legislative standard of both substantial and deemed substantial compliance found in section 43 of the **Mining Act** as it currently exists.

The attempt to revive the cumulative defects doctrine since 1991 is not new. Indeed, it was tried without success in **Canadian Gems and Minerals Ltd. v. Raven Resources Inc.**, MA-023-97, July 14, 1997 (unreported), where it was submitted that in cases where there are a large number of technical errors so as to constitute evidence of staking not done in good

faith, the tests of substantial or deemed substantial compliance should not be available as an escape clause. The tribunal found at page 22:

The tribunal finds that nothing in the wording of subsection 43(2) contemplates the resurrection of the cumulative defects doctrine, which was struck by the Divisional Court in **Ramsay v. Fernberg** in favour of the statutory doctrine of substantial compliance. What has changed since that case is the addition of subsection 43(2), which provides for deeming of substantial compliance in certain circumstances. However, the test of good faith will be examined.

Clause 43(2)(b) sets out the good faith test for deemed substantial compliance, states:

43. (2) The staking out of a mining claim shall be deemed to be in substantial compliance with the requirements of this Act and the regulations even if there is a failure to comply with a number of specific staking requirements if,

- (b) it is apparent that an attempt has been made in good faith by the licensee to comply with the requirements of this Act and the regulations.

The requirements of the legislation in staking involve a myriad of elements. A mining claim must be comprised of between one and 16 units, with the size of a unit being prescribed. The orientation of the boundaries must be in rectangles or parallelograms, with boundaries running astronomically east-west and north-south. There are special rules for irregular boundaries. The commencement of staking must always take place at the northeast corner when lands have been open for staking less than 24 hours, and at a line post or corner post at all other times. Staking must be continuous. There are rules concerning who can stake, erect and inscribe, as well as rules governing helpers. The boundaries must be marked in the prescribed manner, blazing or otherwise. Line posts and witness posts are required in circumstances set out, and details concerning information for inscription and orientation of tags are specified. The inscriptions required on the corner posts is specified. Posts must be erected.

The staking of a mining claim is both a procedure to be undertaken as well as a series of demarcations on the fabric of the land. In the course of this appeal, as well as others, the tribunal has observed an emerging trend of the hiring of individuals as stakers who are athletically gifted, being able to cover the required distances very quickly. This clearly creates an advantage or an edge - the mining claim with priority of completion will be recorded over others with a later completion time in circumstances which are not otherwise suspicious or remain unchallenged. This advantage, as well as others, such as pre-flagging or pre-blazing the boundaries of a prospective mining claim, suggests a change away from actual, on the ground

compliance with all or most of the elements of staking towards staking where the only objective is to arrive first. The fact that the Mining Recorder has discretion to exercise jurisdiction to order remediation of deficiencies after the fact (ss. 110(6) has been perceived as supporting this move away from adherence or compliance (as in **Canadian Gems**).

The fact of the matter is that the staking of a mining claim is more than a simple foot race. There must be a good faith attempt to adhere to the myriad of legislative requirements. Clause 43(2)(b) states that the licensee must attempt to comply. No mention is made of the blazers or other helpers. As there are elements of staking which can be done under the stakers supervision and not by the staker his or herself, it must be implied that all of the helpers must also have made an attempt to comply in good faith, or at the very least, followed the direction of the staker in an exacting manner. In other words, the helpers cannot run amok without consequences. Any actions of the helpers will affect the quality and validity of the staking, and the consequences and responsibility will be borne by the recording licensee. In other words, if the helpers do not perform their tasks as required by the legislation, within the acceptable limits set by the substantial and deemed substantial compliance tests, the recording licensee would run the risk seeing the claim not be acceptable for recording.

The tribunal had come to the conclusion, regarding the seemingly liberating tests of substantial and deemed substantial compliance, that the staking of a mining claim must remain to be regarded as a serious enterprise, one in which going through the motions cannot be found to be sufficient. Otherwise, the erosion of the role of prospectors in staking a mining claim will be accomplished, and there will remain very little compelling reason for the legislature to avoid the logical next step. If the concrete staking elements, ie. the posts, inscriptions, erecting of posts, demarcation of boundaries during the staking itself, are done in such an off-hand manner as to be of no useful purpose on the ground, then there will remain no reason why the industry should not be moved to map staking and eliminate ground staking activities altogether.

The legislature has clearly not taken this step, and therefore, the tribunal finds that the staking requirements set out in O.Reg. 7/96, and the tests in section 43 must be taken seriously and be of a quality which is apparent on the ground immediately after the staking.

The Video

The video was useful in providing visual evidence of what took place on the ground. Much relevant information was not, however, captured, due to positioning, oversight or as having taken place during the time for which there is no film. The tribunal does not make any findings with respect to whether Mr. Young turned off the camera, or whether those who had care and custody of the video edited according to their best advantage. The tribunal is satisfied that it was able to ascertain, through repeated viewing, and comparison of posts in certain segments, that additional information would not alter the ultimate findings and their result in this matter.

The Missing Post

The tribunal finds that Mr. Gosselin's missing post was used as a #2 post by another Royal Oak staker. There were clearly orange flagged posts lying on the ground and available at the commencement of Gosselin's staking, and four orange flagged posts available at 7:52 on the tape, being 9:02 real time. That this Royal Oak staker of the adjacent claim could not differentiate between the various posts available is problematic, and this will be addressed below.

The evidence on the video shows Mr. Gosselin after the completion of his staking, insisting that he has checked all four orange flagged posts without locating his #1 post. What is not clear is whether he actually looked to that side of the orange flagged post leaned and splayed to one side of the green flagged post. In other words, did he check all four faced sides to ascertain whether there were further inscriptions. Someone is heard during this portion asking him whether this specific post could be his, and he indicated that it was not. There is no evidence to suggest that the post was tampered with through chipping off the inscription. An in-person hearing would have provided the tribunal to ascertain the answer to this question. Furthermore, there is no satisfactory explanation of the allegation that the post went missing entirely on the next day. The result in law, however, would have been the same - namely can two stakers of adjacent claims staked simultaneously use the same post? The use of common posts is set out in section 18 of O.Reg. 7/96, and involves a solitary staker, so the answer would be that they cannot.

Interfering with Posts in the Course of Staking

The tribunal finds that an unidentified individual on the Pye/Salo team, bearing the signature white T-shirt with a blue stripe and a black baseball cap, moved **both** of the Pye/Salo team #1 posts by erecting them to a stationary position against the same tree. In fact, this individual had to drag not one, but both of the posts to this location. The tribunal finds that both of these posts had been "erected" by the stakers by simply standing them in an orientation perpendicular to the ground and letting go. Neither individual made any effort to see that their posts could remain erect, and in fact did not see that they were left at a location

The tribunal is unable to reach definitive conclusions concerning the hiatus on the tape. It is quite clear that additional "erecting" of posts took place, in that a second blue post is seen at the later time now erect against the post with the green flagging [This is at the location where the adjacent Royal Oak staker moved and erected his post, being that of Gosselin.] It is only conjecture to suggest that this is the post which was "erected" and dropped by the second Pye staker at 7:54 on the tape, 9:04 real time. However, given the member of the Pye team's penchant for rearranging the posts of its team, this would appear to be the case on the balance of probabilities and it is on this basis that the tribunal will make the finding that this post corresponds to the Pye/Salo staker's post seen at this time on tape.

What is more disturbing about this final view of the posts at this location is that the Royal Oak post used by Gosselin and the other Royal Oak staker has shifted its orientation

somewhat. What is not clear is whether it has been deliberately handled and moved with some other purpose in mind, or whether it has merely been shifted as a result of the post-rearranging activities which have clearly taken place and are attributable to the Pye/Salo team.

Erection of Posts

The rules for staking of land which has been open for less than 24 hours is found in subsection 10(2) of O.Reg. 7/96. In particular, clause 2 provides that only the recording licensee may erect a post. The actions of the unidentified Pye team member had acted in violation of this provision. The seriousness of his action can be found in Part XI of the **Mining Act**, entitled "Offenses, Penalties and Prosecutions" wherein clause 164(1)(c) states:

164. (1) Every person who,

(c) defaces, alters, removes or **disturbs** any post, stake, picket, boundary line, figure, writing or other mark lawfully placed, standing or made under this Act;

is guilty of an offence against this Act and on conviction is liable to a fine of not more than \$10,000.

One piece of information which was not provided by Strike Minerals was to outline the activities of the four helpers listed on the application to record. In other words, did one of those helpers listed remain as a guard on the #1 posts (who took his duties to unauthorized extremes in rearranging two, possibly more, blue flagged posts to an erect and apparent position) or is the individual seen disturbing and perhaps even interfering with the two blue #1 posts a member of the supervisory crew, whose names does not appear on either this or any other application to record for this time frame.

While the issue of whether or not this individual was one of the helpers listed on the application to record for Mining Claim L-1221623 or simply a member of the supervisory team, the fact remains that he was a member of the Pye/Salo team. As such, his actions in interfering with the posts of at least two mining claims, and likely more, served to give the two Pye/Salo stakers an unfair advantage. At the completion of staking, moments which could have been lost, searching on the ground as between no fewer than 13 posts, of which seven were flagged in blue, were avoided. The movement of the posts also served to avoid a duplication of what took place between Royal Oak adjacent stakers using the same post for two claims, at least in part as undoubtedly the Pye/Salo post guards would have been able to direct their stakers to the proper posts. This unfair advantage, when seconds count towards an earlier completion time, cannot be discounted.

Erection of Posts

The issue of erection of posts has been touched on briefly recently in **Coyne v.**

Royal Oak Mines Inc., MA-038-97, June 9, 1998 (unreported), where the failure to erect posts at all (as opposed to allowing them to fall back to the ground, unsupported) was held to be likely to mislead a licensee desiring to stake in the vicinity, within the meaning of clause 43(2)(a).

The video and occurrences in this matter serve to emphasize the importance of the erecting of claim posts. Erecting the #1 post in a manner which is ensured to remain perpendicular to the ground for a prolonged period of time is the only way in which the large group of prepared posts can be differentiated. The use of flagging tape, wire, rope, or even rocks would be a useful step in seeing that the post, when erected, is likely to remain erect for a time.

What is the purpose of an erected post? The post should be readily apparent as a mining claim post, meaning that it should be visible for some distance, however small, in the bush. Blazed lines leading to nowhere are otherwise meaningless, if the post cannot readily be seen or located. The orientation of posts, particularly line posts with tags along with their inscriptions, is to give licensees in the vicinity information as to what land has already been staked. A staker cannot accurately tie on to an existing claim if he cannot locate it, or if a tagged line or witness post is facing in the wrong direction, so that its inscribed information becomes meaningless.

The securing of a claim post is clearly not a necessity, is not contemplated by the use of the word "erecting", as nestling a post within the lower branches of a tree in an erect position would meet the wording as well as the intent in having erected posts. However, the lifting of a claim post to vertical position, with nothing to lean or tie onto, is nothing more than going through the motions. The action has no substance, no lasting effect, and a claim post held in such a fashion, only to be released and fall to the ground, serves no useful purpose to the act of staking. It is an empty gesture, devoid of providing most of the visual information which identifies the post as being a vital element of a mining claim.

The tribunal finds that the staking of Mining Claim L-1221623 by Robert Tydall, by having failed to properly and sufficiently erect his #1 post, done in a manner which did not have any expectation or hope of remaining erect, cannot be deemed to substantially comply with the requirements of the legislation, within the meaning of clause 43 (2)(a) of the **Mining Act**. A post left lying on the ground is of virtually no assistance to stakers in the vicinity, particularly on the crucial morning of September 17, 1996. After the initial 9:00 a.m. rush, the vast numbers of stakers seeking to secure claims in the Temagami Land Caution area would be scouring the landscape for evidence of actual stakings, seeking to secure any and all remaining parcels. The tribunal has no difficulty in finding that the purported erecting of posts in this manner is likely to mislead others desiring to stake in the vicinity.

As to the effect of having the #1 post interfered with, so that it ended up erected, if not by Tyndall's own hand, the tribunal finds that Tyndall must bear the consequences of the actions of anyone on the Pye/Salo team, of which he was a member. An unfair advantage was created. A possible offence has occurred, although without a prosecution this cannot be stated

as a certainty. The tribunal finds that it will apply its jurisdiction under section 121 of the **Mining Act**, that a decision be made upon the real merits and justice of the case, in ascribing the actions of the whole team to an assessment of the staking for Mining Claim L-1221623 under dispute. Strike Mining Claim L-1221623 will be cancelled.

Single Blazer on Two Mining Claims

It was noted that there was only one blazer from the Pye/Salo team seen moving from the #1 to #2 post at the commencement of staking, notwithstanding that two Pye/Salo stakers were involved. The argument was made that nothing prevents the sharing of blazers of adjacent claims. The tribunal does not accept this submission. The staking of a mining claim requires one recording licensee and helper(s) to assist on that mining claim. Unlike a common road shared between two subdivisions, the boundaries of a mining claim demarcated during staking pertain to only that mining claim, even if they involve the same boundary of another mining claim. The blazing for a mining claim can pertain to only that one claim. While the tribunal does not have the application to record of the second Pye/Salo staking of this claim, the video is clear that there was one blazer for two claims.

This defeats the test of deemed substantial compliance in clause 43(2)(b) of the **Mining Act** as being an indication that there was not an attempt in good faith to comply with the staking requirements. This finding also leads to the conclusion that the Strike Mining Claim L-1221623 be cancelled.

Royal Oak Staking

It is unfortunate that Mr. Gosselin's staking should be displaced by another staker inadvertently using his post. This is particularly so, as Mr. Gosselin was clearly seen on tape erecting his post against an evergreen tree in the lower left of the frame. However, the post was neither secured nor stable, and is seen falling almost immediately to the ground, once again lying across all of the other posts bunched together on the ground. The second Royal Oak staker, who is seen using this post, actually drags it along the ground and leans it erected against the post with the green flagging tape, so that it ended up some distance from where Mr. Gosselin erected it initially.

There is jurisdiction in the Mining Recorder under clause 110(6)(d) to order the replacement of missing posts, and of course, the tribunal can exercise its jurisdiction and require the Mining Recorder to issue such an order. If the circumstances were different, in that were it not a Royal Oak staker who inadvertently used Mr. Gosselin's #1 post, the tribunal finds that it would be justified in requiring the Mining Recorder to issue such an order. However, the tribunal is inclined to apply the same degree of responsibility to the Royal Oak team members as was applied to the Pye/Salo team for the actions of the individuals.

The matter of the erroneous use of Gosselin's post merely proves to underline the findings of the tribunal concerning the proper erecting of claim posts. Those claim posts which are standing will not be disturbed, while those lying on the ground are free to be used. This is a completely understandable assumption, and one which the second Royal Oak staker has made to Mr. Gosselin's detriment.

The tribunal finds that the facts surrounding the Royal Oak staking by Gosselin and the unnamed Royal Oak staker on an adjacent claim do not warrant the exercise of the tribunal's discretion and jurisdiction under section 121 of the **Mining Act** to require the Mining Recorder to issue an order to replace the missing post. For these reasons, the appeal of Royal Oak will be dismissed.

Costs

As the Strike Mining Claim L-1221623 has been cancelled, the basis for Mr. Forbes submission for costs cannot be entertained. The tribunal finds that there will be no order as to costs payable by either party to this appeal.

Conclusions

The Strike Minerals Mining Claim L -1221623 is cancelled. The erecting of posts in a manner which did not have even a remote likelihood of remaining standing displays a lack of intent to comply with this staking element required by O.Reg. 7/96, but more particularly, is likely to mislead other licensees staking in the vicinity. This activity cannot be cured by teammates purporting to stand the fallen post against a tree, while the staker is in the process of completing his claim. Such interference may risk prosecution under Part XI of the **Mining Act** by those moving the posts, but in any event, cause an unfair advantage to the particular staking team. The use of a single blazer on two claims is found to not be an attempt in good faith to comply with the requirements of the Act.

That part of the Royal Oak appeal seeking the recording of Mining Claim L-1220307 is dismissed. The Royal Oak #1 post for Mining Claim L-1220307 was used as the #2 post by another Royal Oak staker on an adjacent mining claim. Under the circumstances, owing to the fact that the cause of the missing post was a Royal Oak teammate, the tribunal will not exercise its discretion in directing the Mining Recorder to issue an order for replacement of the missing post pursuant to clause 119(6)(d).

There are no costs awarded to either party in this appeal.

The effective date of this Order will be October 15, 1998, thereby putting the parties in the same position with respect to any potential re-staking when the lands become open.